No. 76-134

In the Supreme Court of the United States

OCTOBER TERM, 1976

MARIE M. MCMAHON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-134

MARIE M. MCMAHON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in granting summary judgment for the United States, dismissing her negligence and wrongful death actions under the Federal Tort Claims Act, because there existed a genuine issue as to several material facts.

1. Petitioner's decedent, a major in the United States Army, was hospitalized twice during September and October 1963 for ailments that were diagnosed as delirium tremens and chronic alcoholism. Proceedings begun in November 1963 led to a recommendation by the Elimination Service Board that Major McMahon be removed from the military on grounds of alcoholism. Shortly thereafter, Major McMahon suffered several more seizures and, after a complete neurological examination, his condition was rediagnosed as a cerebral disorder.

Nonetheless, the Elimination Board determined in December 1964 that the decedent should be discharged from the service and, on January 29, 1965, he was honorably discharged (Pet. App. 3a, 3b-4b).

In February 1965, Major McMahon challenged his removal by filing a request with the Army Board for Correction of Military Records to have his records altered to reflect that he was retired for a physical disability. In addition, he applied to the Veterans Administration for a disability rating. The Board for Correction denied the application for insufficient evidence in April 1965; one month later, however, decedent was granted a 100 percent disability rating by the VA, retroactive to January 30, 1965, for chronic brain syndrome associated with convulsive disorder with cerebral atrophy. Decedent then filed a second application for correction of his records. In March 1967, the Board for Correction recommended that the records be changed to reflect that he was relieved from active duty by reason of physical disability, and that he be placed on the Army's Temporary Disability Retired List as of January 29, 1965. The Board's recommendations became effective in March or April 1967 (Pet. App. 3a-4a, 4b-6b).

During the following two years, Major McMahon was periodically examined by Army physicians. In 1968, a Physical Evaluation Board conducted a review of his temporary disability retirement status and recommended that he be permanently retired with a 20 percent disability. After Major McMahon disagreed with this recommendation, the Board in April 1969 recommended 100 percent disability, in which decedent concurred. Two weeks later, Major McMahon was found unconscious in his home; he died on June 5, 1969, from causes determined to be bronchopneumonia bilateral (terminal), seizure disorder (primary), and aspiration (contributory) (Pet. App. 4a, 6b-8b).

Petitioner filed an administrative claim with the Department of the Army on or about June 1, 1971, which was denied on December 30, 1971. She then instituted this action in the United States District Court for the District of Columbia under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2675(a), contending that the government had (1) negligently misdiagnosed decedent's ailments and (2) exacerbated his physical and emotional conditions through harassment and administrative negligence in processing his requests for correction of his records and receipt of disability benefits. The district court granted summary judgment for the government, holding that the negligent misdiagnosis claim was barred by the statute of limitations and that the undisputed facts in the record failed to support a claim of "harassment" and instead showed that the Army had properly followed its own procedures in good faith and had ultimately determined the decedent's status correctly (Pet. App. B). The court of appeals affirmed in an unpublished *per curiam* opinion (Pet. App. A).

2. The district court correctly granted the government's motion for summary judgment, since the records in this case conclusively demonstrated the absence of any genuine issue of material fact.[1] Indeed, even now petitioner has failed to allege any disputed facts which, if proven, would demonstrate that her negligence claim was filed within the applicable statute of limitations or that her harassment claim is meritorious.[2] To the

---

[1]Moreover, as the court of appeals observed (Pet. App. 5a), petitioner did not object to the "completeness of the record upon which [the district court's summary judgment] determination was made * * *."

[2]We note that petitioner has also failed to cite any precedent in support of a right to recovery under the Tort Claims Act for administrative "harassment."

contrary, the undisputed evidence shows (Pet. App. 12b) that decedent's

> condition * * * had been correctly diagnosed by June-July, 1964. Certainly, the granting of a 100% disability rating by the VA on May 17, 1965, for chronic brain syndrome associated with convulsive disorder and cerebral atrophy made clear that any prior diagnosis of chronic alcoholism was not a complete or correct diagnosis. At that time, Major McMahon knew or should reasonably have known of any damage that may have occurred due to any previous maldiagnosis.

Therefore, the court's award of summary judgment based on the defense of the statute of limitations was proper. See 6 Moore's *Federal Practice* para. 56.15 [1.-0], p. 56-399 (1976).

Similarly, in regard to the allegation that the emotional stress caused by the Army's administrative processes was the direct and proximate cause of Major McMahon's death, the district court correctly concluded on the basis of the record that petitioner had failed to state "any actionable claim" (Pet. App. 12b). The statement of material facts submitted by the government—which was never specifically controverted by petitioner (Pet. App. 3a, n. 1)—clearly demonstrated that the alleged "harassment" was nothing more than the Army's normal administrative procedures, many of which had been initiated by Major McMahon. As the court noted (Pet. App. 12b-13b; footnote omitted):

> [I]t cannot be said that the Army acted beyond or in want of statutory procedures or maliciously. Normal procedures were followed. Thorough medical examinations and administrative hearings were held. Disagreements as to Major McMahon's disability status occurred, but ultimately the disposition reached was in accordance with the 1965 VA findings: 100% disability. The duty owed Major McMahon was to determine his retirement and disability status in accordance with the Army's established procedures. Undisputed facts in the record show that this was done.

Although petitioner contends that her failure to dispute the government's statement of facts was justified because she was denied the opportunity to pursue discovery, a party opposing summary judgment must at least comply with the spirit, if not the letter, of Rule 56(f), Fed. R. Civ. P.,[3] by setting forth the specific type of proof which, but for lack of discovery, he would have proffered. See, *e.g.*, *Littlejohn* v. *Shell Oil Co.*, 483 F. 2d 1140, 1146 (C.A. 5) (*en banc*), certiorari denied, 414 U.S. 1116. Since petitioner failed to do so and offered no evidence to substantiate the allegations of her complaint or to rebut the government's statement of material facts, summary judgment

---

[3]Rule 56(f) provides:

> (f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

for the government was warranted. See, *e.g.*, *Richardson* v. *Rivers*, 335 F. 2d 996, 999 (C.A. D.C.).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

---

[4]*Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, does not support petitioner. Respondent's failure in that case to rebut the possibility that there had been a policeman in its store at the time of the events in question was fatal to its summary judgment motion only because of "the allegation in petitioner's complaint, a statement at her deposition, and an unsworn statement by a Kress employee, all to the effect that there was a policeman in the store at the time of the refusal to serve [petitioner], and that this was the policeman who subsequently arrested her" (398 U.S. at 156-157; footnotes omitted).

DOJ-1976-09